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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20348**

FILE: B-189971

DATE: May 23, 1978

MATTER OF: Orthopedic Equipment Co.

DIGEST:

1. Complaint that solicitation was ambiguous is timely raised where protest was filed before bid opening, because protester's original complaint stated ultimate issue. Moreover, ambiguity at issue was not apparent on face of solicitation.
2. Due to ambiguity of specification regarding whether use of lead alloy was permitted, requirement for snap links should be resolicited under revised specifications.

The Orthopedic Equipment Co. (Orthopedic) protests the adequacy of solicitation DSA100-77-B-0987, and Military Specification MIL-S-1478E, as amended, in connection with the Defense Logistics Agency's procurement of snap links, formally described as "Snaplinks, Mountain Piton."

Orthopedic has raised a number of objections, claiming that the solicitation is ambiguous and unduly restricts competition. As the incumbent contractor, Orthopedic was frustrated in attempting to perform under the same requirements. In its view, the solicitation is impossible to perform as written. The protester states that previous contracts had been performed by AMF Wyott, Inc. and that Wyott's snap links were accepted by the Government under similar specifications. Orthopedic argues that Wyott's snap links were nonconforming and that acceptance and use of the Wyott snap link demonstrates that the solicitation and Military Specification do not properly reflect the Government's minimum needs.

The focus of the protester's complaint has shifted somewhat while this protest has been pending. Orthopedic

now believes that its difficulties resulted in substantial part from its understanding that the applicable Military Specification requires or at best is ambiguous regarding the use of leaded steel alloys. As a result, factual matters originally disputed are no longer controverted.

Wyott denies that it failed to meet its contractual requirements. It maintains that the difficulties which Orthopedic encountered reflect at most poor manufacturing technique and that its problems have been basically those which can be expected as a normal incidence of learning to produce an item for the first time. Although Wyott admits that it has used lead in performing past contracts, it asserts that it also has produced snap links using unleaded steel, when economic circumstances and availability of materials required that it do so. It denies that use of leaded steel affects the strength or other characteristics of the finished product, but concedes that:

"* * * the use of lead does assist in that lead is a cutting agent which can, under proper circumstances, increase the number of units that can be made by a machine in a specified time and also increase the life of tools. * * * The use of lead or the nonuse of lead ha[s] no effect in the production of satisfactory Snap Links, and in successfully machining after heat treatment. Lead may make it possible in the proper circumstances for a contractor to do something faster, but it certainly doesn't permit a contractor to do something that he couldn't do at all previously * * *."

Wyott has filed a cross-protest, arguing that it should receive award under the subject IFB, because it is the apparent low offeror and because in its view use of lead is clearly permitted under the Military Specification. Orthopedic filed its protest before award, and in the circumstances, submitted no bid.

DLA agrees with Wyott's position, asserting that in its view the Military Specification is clear. Moreover, DLA asserts that Orthopedic's complaint regarding the use of leaded steel is untimely because that issue was raised only during the pendency of the protest, not before bid opening. The contracting officer also believes that Orthopedic was not prejudiced in bidding because the lead alloy issue "was non-existent" as a factor affecting Orthopedic's decision not to bid.

Regarding the last two issues, Orthopedic in its initial protest letter complained that:

"* * * The specification * * * calls for use of alloy steel in accordance with Specification QQ-S-624. With respect to manufacture of snap links, the specification QQ-S-624 does not fully or accurately state requirements of the Government because * * * [Orthopedic's] manufacturing experience indicates that some of the steel alloys described therein would be wholly unsatisfactory * * *."

Further, Orthopedic complained that the hardness requirements as applied to the heat treated snap link body were at best unclear, because in its experience "heat treatment of the entire body of the snap link appears to create severe problems of warpage and misalignment."

Even though it is not clear when Orthopedic discovered that the alloy used by Wyott contained lead, we believe that the protest was timely filed because the ultimate issue--the ambiguity or restrictiveness of the specifications as they impact upon the difficulty experienced in meeting the hardness and tolerance requirements--was stated. Moreover, we believe that Orthopedic would not reasonably have anticipated that DLA would take the position that leaded steel could be used. As explained below, we believe Orthopedic's position that the specifications precluded the use of leaded steel in manufacturing the snap link body

was reasonably founded. In the circumstances the leaded steel issue was not a matter which was reasonably apparent to Orthopedic from the face of the solicitation, within the meaning of § 20.2(b)(1) of our Bid Protest Procedures. 4 C.F.R. § 20.2(b)(1) (1977).

In connection with the use of leaded steel, DLA states:

"* * * the 29 December 1972 amendment to MIL-S-1476D (MIL-S-1478E) requires QQ-S 624 (Steel bar, alloy, hot-rolled and cold finished; general purpose). The specifications at 3.2.5. Steel, Alloy allow a manufacturer five options for the chemical composition of the steel alloy, one of which is QQ-S-624C. (It should be noted that at specification 3.2.5. of MIL-S-1478E, the chart lists 12L14 and 11L17. The 'L' represents lead under the AISI, which in effect puts OEC on notice that lead is a permissible component in the steel. * * *)."

Section 3.2.5 of the specifications provides, as follows:

"* * * Steel, alloy. Alternatively, steel for keeper shall conform to the following chemical composition and shall be tested as specified in 4.4.1.3.

AISI No.	*	*	*	Pb
12L14	*	*	*	.15 - .35
11L17	*	*	*	.15 - .35

(the emphasis added; chemical symbol Pb denotes permitted lead content.) Section 4.4.1.3, referred to in section 3.2.5, states that "Alternative steel for keeper referenced in 3.2.5 shall be tested and chemically analyzed in accordance with test requirements

of QQ-S-624. Samples not in accordance with the chemical composition specified in 3.2.5 result in rejection of the lot of steel." (Emphasis added.)

The keeper is a component of the snap link which is distinct from the body. The steel composition of the body is referred to only in specification section 3.2.1, which states that:

"* * * Steel, alloy. Alloy steel for body and keeper (see 3.2.5), shall conform to steel Number 4130 or 4140, as hot rolled (HR) or cold finished (CF) condition of QQ-S-624."

We recognize that leaded steel was permitted in the manufacture of the keeper. Orthopedic's concern is with the composition of the body.

Wyott refers to Federal Standard 66c and related American Society for Testing and Materials (ASTM) standards, claiming that there is nothing in the definition of 4130 or 4140 steel which prevents use of leaded steel at the contractor's discretion. Those same standards, however, indicate that if lead were required comparable steels would be indicated as 41L30 or 41L40, respectively. We find nothing in the Federal or ASTM standards which of itself resolves the essential question: whether the omission of a designation (L) for lead when steel is specified by the Government precludes the use of lead, or whether offerors would reasonably understand--as Orthopedic says it did not--that omission of the L permits its use.

We believe that it cannot be reasonably maintained that the reference "(see 3.2.5)" in the steel alloy specifications section 3.2.1, refers to the snap link body and keeper, rather than to the keeper only. In our view, the specifications in question clearly distinguish throughout between acceptable steel alloys for the body and keeper. In addition to the foregoing, any question as to the meaning of section

3.2.1 is resolved by referring to sections 3.2.5, 3.4 and 4.4.1.3, which clearly indicate that an exception is permitted, alternatively, only with regard to the metallurgical composition of the keeper. Section 3.4 relating to heat treatment states that "Heat treatment is not required for the keeper if made from steel alloys 12L14 or 11L17 (see 3.2.5)."

Further, we believe that without more the ASTM and Federal Standard nomenclature should be construed in a manner consistent with the usual rule of legal construction--that the mention of one thing is the exclusion of alternatives. In our view, Orthopedic or other offerors could have reasonably assumed that designation of steel for the manufacture of the body of the snap link precluded the use of lead.

In this regard, the record further shows that the Technical Quality and Assurance Division, DPSC, came to the same initial conclusion after reviewing Orthopedic's response to DLA's initial report to our Office. Based on that conclusion, DPSC personnel recommended that the solicitation be cancelled and resolicited under specifications amended to expressly permit use of 41L30 or 41L40 steel.

In the circumstances, we are of the view that the recommendation should have been followed. The language in question is at best ambiguous. Use of unleaded steel was not required to meet the Government's actual requirements. Accordingly, we believe DLA should cancel this solicitation and resolicit its requirements under a specification which has been revised to clearly indicate that leaded steel is permitted in the manufacture of the snap link. By separate letter of today we are advising the Director, DLA, of this recommendation.

Orthopedic's protest is sustained and the cross-protest filed by Wyott is denied.

This decision contains a recommendation for corrective action to be taken by DLA. Therefore, we are furnishing copies of our decision to the Senate Committees on Governmental Affairs and Appropriations and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by DLA to those committees concerning the action taken with respect to our recommendation.


Acting Comptroller General
of the United States